

subpart J of part 2634 of this chapter. An employee who divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) *Official duties that give rise to potential conflicts.* Where an employee's official duties create a substantial likelihood that the employee may be assigned to a particular matter from which he is disqualified, the employee should advise his supervisor or other person responsible for his assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

[61 FR 66841, Dec. 18, 1996, as amended at 67 FR 12445, Mar. 19, 2002]

## Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

### § 2640.201 Exemptions for interests in mutual funds, unit investment trusts, and employee benefit plans.

(a) *Diversified mutual funds and unit investment trusts.* An employee may participate in any particular matter affecting one or more holdings of a diversified mutual fund or a diversified unit investment trust where the disqualifying financial interest in the matter arises because of the ownership of an interest in the fund or trust.

*Example 1 to paragraph (a):* An employee owns shares worth \$100,000 in several mutual funds whose portfolios contain stock in a small computer company. Each mutual fund prospectus describes the fund as a “management company,” but does not characterize the fund as having a policy of concentrating its investments in any particular industry, business, single country (other than the U.S.) or bonds of a single State. The employee may participate in agency matters affecting the computer company.

*Example 2 to paragraph (a):* A non-supervisory employee of the Department of Energy owns shares valued at \$75,000 in a mutual fund that expressly concentrates its holdings in the stock of utility companies. The employee may not rely on the exemption in paragraph (a) of this section to act in matters affecting a utility company whose stock is a part of the mutual fund's portfolio because the fund is not a diversified fund as defined in § 2640.102(a). The employee may, however, seek an individual waiver under 18 U.S.C. 208(b)(1) permitting him to act.

(b) *Sector mutual funds.* (1) An employee may participate in any particular matter affecting one or more holdings of a sector mutual fund where the affected holding is not invested in the sector in which the fund concentrates, and where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund.

(2)(i) An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund and the aggregate market value of interests in any sector fund or funds does not exceed \$50,000.

(ii) For purposes of calculating the \$50,000 de minimis amount in paragraph (b)(2)(i) of this section, an employee must aggregate the market value of all sector mutual funds in which he has a disqualifying financial interest and that concentrate in the same sector and have one or more holdings that may be affected by the particular matter.

*Example 1 to paragraph (b):* An employee of the Federal Reserve owns shares in the mutual fund described in the preceding example. In addition to holdings in utility companies, the mutual fund contains stock in certain regional banks and bank holding companies whose financial interests would be affected by an investigation in which the Federal Reserve employee would participate. The employee is not disqualified from participating in the investigation because the banks that would be affected are not part of the sector in which the fund concentrates.

*Example 2 to paragraph (b):* A health scientist administrator employed in the Public Health Service at the Department of Health and Human Services is assigned to serve on a Departmentwide task force that will recommend changes in how Medicare reimbursements will be made to health care providers. The employee owns \$35,000 worth of shares in the XYZ Health Sciences Fund, a sector mutual fund invested primarily in health-related companies such as pharmaceuticals, developers of medical instruments and devices, managed care health organizations, and acute care hospitals. The health scientist administrator may participate in the recommendations.

*Example 3 to paragraph (b):* The spouse of the employee in the previous Example owns \$40,000 worth of shares in ABC Specialized Portfolios: Healthcare, a sector mutual fund

that also concentrates its investments in health-related companies. The two funds focus on the same sector and both contain holdings that may be affected by the particular matter. Because the aggregated value of the two funds exceeds \$50,000, the employee may not rely on the exemption.

(c) *Employee benefit plans.* An employee may participate in:

(1) Any particular matter affecting one or more holdings of an employee benefit plan, where the disqualifying financial interest in the matter arises from membership in:

(i) The Thrift Savings Plan for Federal employees described in 5 U.S.C. 8437;

(ii) A pension plan established or maintained by a State government or any political subdivision of a State government for its employees; or

(iii) A diversified employee benefit plan, *provided*:

(A) The investments of the plan are administered by an independent trustee, and the employee, or other person specified in section 208(a) does not participate in the selection of the plan's investments or designate specific plan investments (except for directing that contributions be divided among several different categories of investments, such as stocks, bonds or mutual funds, which are available to plan participants); and

(B) The plan is not a profit-sharing or stock bonus plan.

NOTE TO PARAGRAPH (c)(1): Employee benefit plans that are tax deferred under 26 U.S.C. 401(k) are not considered profit-sharing plans for purposes of this section. However, for the exemption to apply, 401(k) plans must meet the requirements of paragraph (c)(1)(iii)(A) of this section.

(2) Particular matters of general applicability, such as rulemaking, affecting the State or local government sponsor of a State or local government pension plan described in paragraph (c)(1)(ii) of this section where the disqualifying financial interest in the matter arises because of participation in the plan.

*Example 1:* An attorney terminates his position with a law firm to take a position with the Department of Justice. As a result of his employment with the firm, the employee has interests in a 401(k) plan, the assets of which are invested primarily in stocks chosen by an independent financial

management firm. He also participates in a defined contribution pension plan maintained by the firm, the assets of which are stocks, bonds, and financial instruments. The plan is managed by an independent trustee. Assuming that the manager of the pension plan has a written policy of diversifying plan investments, the employee may act in matters affecting the plan's holdings. The employee may also participate in matters affecting the holdings of his 401(k) plan if the individual financial management firm that selects the plan's investments has a written policy of diversifying the plan's assets. Employee benefit plans that are tax deferred under 26 U.S.C. 401(k) are not considered profit-sharing or stock bonus plans for purposes of this part.

*Example 2:* An employee of the Department of Agriculture who is a former New York State employee has a vested interest in a pension plan established by the State of New York for its employees. She may participate in an agency matter that would affect a company whose stock is in the pension plan's portfolio. She also may participate in a matter of general applicability affecting all States, including the State of New York, such as the drafting and promulgation of a rule requiring States to expend additional resources implementing the Food Stamp program. Unless she obtains an individual waiver under 18 U.S.C. 208(b)(1), she may not participate in a matter involving the State of New York as a party, such as an application by the State for additional Federal funding for administrative support services, if that matter would affect the State's ability or willingness to honor its obligation to pay her pension benefits.

(d) *Matters affecting mutual funds and unit investment trusts.* In addition to participation in the particular matters affecting the holdings of mutual funds and unit investment trusts as permitted under paragraphs (a) and (b) of this section, an employee may participate in any particular matter of general applicability affecting a mutual fund or unit investment trust where the disqualifying financial interest arises because of the ownership of an interest in the mutual fund or unit investment trust.

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